In The

Supreme Court of the United States

October Term, 1979

No. 79-151

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

vs.

ST. AGATHA HOME FOR CHILDREN, INC. and ROBERT KEATING,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

JAMES A. CUDDIHY
Attorney for Petitioner
Suite 604
790 Madison Avenue
New York, New York 10021
(212) 988-6800

1419 LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 New York, N.Y. (212) 840-9494 Philadelphia, Pa. (215) 563-5587 Washington, D.C. (202) 783-7288

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited:

Contents

Statutes Cited:

United States Constitution Cited:

Rules Cited:

APPENDIX

Contents

In The

Supreme Court of the United States

October Term, 1979

No.

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

vs.

ST. AGATHA HOME FOR CHILDREN, INC. and ROBERT KEATING,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, The People of the State of New York, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the State of New York entered in the above case, No. 178, on May 1, 1979 (*infra,* Appendix A, 1a), based upon the opinion of said court of appeals, also dated May 1, 1979 (*infra,* Appendix B, 3a), and remitted to the Town Court of the Town of Pound Ridge on that date affirming a decision of the

Appellate Term of the Supreme Court of the State of New York (*infra*, Appendix C, 5a), which reversed a decision of the Town Court of the Town of Pound Ridge, New York (*infra*, Appendix H, 14a).

JURISDICTION

The judgment of the Court of Appeals of the State of New York was entered on May 1, 1979, pursuant to the opinion of said court also on May 1, 1979. The opinion will appear in the official reports as ____N.Y.____(1979). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A. §1256(3).

STATUTES AND ORDINANCES INVOLVED

1. Article II, Sections 200 and 220 of the Town Law of the Town of Pound Ridge — Appendix I.

2. Article III, Section 300 of the Town Law of the Town of Pound Ridge — Appendix J.

3. Article IV-A, Sections 410, 411, 411.101 of the Town Law of the Town of Pound Ridge — Appendix K.

4. Article V, Sections 541 and 542 of the Town Law of the Town of Pound Ridge — Appendix L.

5. Section 261 of the Town Law — Appendix M.

QUESTIONS PRESENTED

1. Whether a Town government, under its broad constitutional police powers, may enforce a long-standing zoning ordinance in the promotion of the general community welfare, which would effectively bar, among others, "group homes" from being established within a three acre residential zoning district,

and would not be violative of the Fourteenth Amendment of the United States Constitution nor infringe any other rights or freedoms otherwise protected by the Constitution of the United States.

2. Whether the Court of Appeals of the State of New York can arbitrarily disregard or subtly attempt to avoid the tenets and doctrines of law espoused by the Supreme Court of the United States in the cases of *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 797 (1974) and *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), which cases are directly in point. 42 LW 4475 45 LW 4550

3. Whether the court of appeals can impliedly hold that excluding a group home from a single residential neighborhood contravenes a public policy of the State, although such alleged public policy is clearly opposed to the law of the land as set forth in *Belle Terre* and *Moore*.

STATEMENT OF THE CASE

St. Agatha Home for Children Inc. ("St. Agatha"), a private agency and Robert Keating ("Keating"), the defendants-respondents herein, were convicted in the Town Court of the Town of Pound Ridge, Pound Ridge, N.Y., after a two-day trial, for use of a one-family dwelling in Pound Ridge contrary to a local zoning ordinance prohibiting such occupancy by more than one family, *i.e.*, one or more persons in a domestic relationship based on birth, marriage or other domestic bond. At the trial it was established that St. Agatha and Keating were using the home as a "non-secure detention facility" for the care of alleged persons in need of supervision ("PINS") and alleged juvenile delinquents. The court held that there was neither statutory authority nor case law that allowed this use of a one-family

dwelling by a private agency and accordingly held that St. Agatha and Keating were in violation of the zoning ordinance as charged.

St. Agatha is a New York corporation which merged with the New York Foundling Hospital. Keating is the Director of Community Services for St. Agatha. One of Keating's functions was to search for, examine and acquire leasehold interests in one family dwellings for the purpose of establishing residences that were to be administered by St. Agatha in accord with the laws of the State. After approval of the leased premises was obtained by the New York State Division for Youth, St. Agatha would operate the home for a fee which varied according to the number of children that were committed to the home.

Through Keating's efforts, a home was leased in Pound Ridge, which subsequent to the signing of the lease, was used and, as of the date of the trial and thereafter, continues as a non-secure detention facility for boarding children for a period of no more than about two or three months. The children do not attend local schools nor do they participate in community activities of any kind in Pound Ridge. They are given courses in vocational and academic training from two resident teachers at the home and additionally three child welfare workers are there during the daytime while two staff workers remain on duty overnight with one of them awake at all times. There is no family or blood relationship between the teachers, supervisors or the children and in addition to the various duties performed by the workers, custodial duties and the preparation of meals are also their responsibility. Briefly and succinctly, the children are transients.

The home is used as a non-secure detention facility and the children referred there by the Family Court of Westchester County are alleged PINS, are from broken homes where 95% to 98% of the families have severe social or emotional problems and the children are alleged juvenile delinquents who have been

accused of offenses including auto thefts, shoplifting and burglaries. As of the time of the trial in Town Court, approximately thirty children had already passed through the home.

Prior to the issuance of a summons by the Town Attorney charging St. Agatha and the other defendants with a violation of the Town Zoning Ordinance, an information meeting was held by St. Agatha in the Town of Pound Ridge on January 12, 1977, explaining their purposes and function and giving formal notification to the Town of the lease. The lease had already been executed between the lessor and St. Agatha at this time. After January 12th and prior to the issuance of a summons by the Town Attorney, the Building Inspector, Murray Crandell ("Crandell"), notified St. Agatha of the violation of the Town ordinance that prohibited the occupancy of a single family dwelling by more than one family. Although no written notice was given to them to cease and desist the violation, on several occasions Crandell advised St. Agatha through Keating that the home was in violation of the Town ordinances and that they should cease and desist.

The summons subsequently issued by the Town of Pound Ridge charged St. Agatha, Keating and the other defendants of violating the zoning ordinance of the Town of Pound Ridge, Article II, Sections 200 and 220; Article IV-A, Sections 410, 411, 411.101; Article V, Sections 541 and 542; Article III, Section 300 and the zoning map of Pound Ridge, by using a home zoned as a one-family dwelling unit for occupancy by more than one family in an area zoned for three-acres minimum, where a single family is defined under the zoning law as "one or more persons occupying a dwelling unit and living as a single housekeeping unit in a domestic relationship based on birth, marriage or other domestic bond."

The violations of the zoning ordinances are quasi-criminal offenses, essentially civil matters, as are most vehicle and traffic

violations, although criminal procedures and forms are applied. *People v. Bonnerwith,* 69 Misc. 2d 516, 330 N.Y.S. 2d 248 (1972); *Mann v. Town of Southold,* 44 Misc. 2d 978, 255 N.Y.S. 2d 308 (Sup. Ct. 1964); *People v. Dombroski,* 62 Misc. 2d 85, 310 N.Y.S. 2d 447 (County Ct. 1970).

At the conclusion of the trial and after hearing certain motions and after submission of briefs involving constitutional questions, among others, of the police power of communities to promulgate zoning ordinances, due process and equal protection of the law, by the parties herein involved, the court rendered its decision, order and conditions of conditional discharge.

The court found St. Agatha and Keating in violation of the zoning ordinance as charged and found the zoning law to be constitutional. During and after the trial, certain other motions were made and decided in the Town Court and in the Supreme Court of Westchester County.

The defendants-respondents received a stay from the Supreme Court of the State of New York, Westchester County and appealed from the judgment of conviction and of conditional discharge to the Appellate Term of the Supreme Court of the State of New York, Second Department, 9th and 10th Districts.

After oral argument and submission of briefs by the parties, the Appellate Term reversed the conviction unanimously and dismissed the information. Its decision, in full, states:

> "The non-secured detention facility involved here was established in conformity with State policy and could not be prohibited by a contrary local zoning ordinance (see County Law §218-a; Executive Law, 501, 510-a; see also Group House of Port Washington, Inc. v. Board of Zoning and Appeals of the Town of North Hempstead, 55 A.D. 2d 636)."

Pursuant to Rule 500.8 of the Rules of the Court of Appeals of the State of New York and Criminal Procedure Law §40.20, an application was made for permission to appeal to the Chief Judge of the Court of Appeals on June 12, 1978.

On July 11, 1978, the Chief Judge of the Court of Appeals, Hon. Charles D. Breitel, signed an order granting the appellant leave to appeal to the court of appeals. Subsequently, the notice of appeal was filed on July 24, as well as the jurisdictional statement on August 15, 1978. As part of the jurisdictional statement, a copy of the order granting leave to appeal and the notice of appeal were filed together with a copy of the judgment of the Appellate Term and the opinion of the Justice Court of the Town of Pound Ridge as reviewed by the Appellate Term.

After hearing oral argument on March 28, 1979, the Court of Appeals of the State of New York rendered its opinion affirming the decision of the Appellate Term, on May 1, 1979, and the petition for a writ of certiorari is herein directed to that opinion.

The defendants on motion and in their briefs in all of the courts espoused the doctrine that the Town ordinance was unconstitutional as violative of its right to equal protection of the law and as violative of the constitutional prohibition against abridgement of the free exercise of religion and of due process presumably all under the dictates of the First Amendment of the United States Constitution. Contrariwise, the People maintained and argued throughout all of the proceedings that the zoning ordinance was valid and constitutional and a proper use of the police power of the community. The Town Court specifically addressed itself to the defendants' argument that the zoning ordinance was unconstitutional since there was no ascertainable standard of conduct by which they would gauge their actions in attempting to establish a "family" setting or "other domestic bond" (Appendix H, 14a-34a). It held that the Town was empowered to establish zoning regulations consistent with its

police power to control, through local legislation, matters that would affect the health, safety and welfare of the residents of the Town. It referred to the landmark case of *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 and *Belle Terre* as being dispositive of the constitutional issues (Appendix H, 14a-34a) and the enabling provision of the Town Law, Section 261 (Appendix M, 40a).

In short, the constitutional issues were raised in the first instance in the Town Court and at every succeeding level of jurisdiction by both parties and in numerous briefs.

REASONS FOR GRANTING THE WRIT

The Court of Appeals of the State of New York has decided this case in a way not in accord with the decisions of the Supreme Court and, in particular, *Euclid, Belle Terre* and *Moore,* and clearly falling within the prohibition of Part V, Rule 19(a) of the Rules of the Supreme Court of the United States. The Supreme Court has sustained, as constitutional, a zoning ordinance precisely the same as the one here at issue in *Belle Terre* and then approved its *Belle Terre* doctrine in *Moore.*

Contrary to the first paragraph of the court of appeals per curiam opinion, and its implications as to burden of proof in a criminal proceeding, all of the elements were readily and clearly proved. In fact, there was never a factual question as to the simple underlying issues. The so-called criminal proceeding was brought as a simple violation of a local zoning ordinance and is quasi-criminal in nature, very much like the issuance of a summons for a parking violation, traffic offense or unsightly accumulation of trash.

In *Euclid,* some fifty-three years ago, the Supreme Court sanctioned comprehensive land use regulation as a valid exercise of the police power. Only infrequently since has the Supreme

Court had occasion to consider cases involving municipal zoning enactment. Perhaps the two most significant cases in the field have been *Belle Terre* and *Moore.* The Court has consistently reaffirmed the general propriety of governmental undertakings directed towards the segregation of incompatible uses of land and the facilitation of the productive uses and enjoyment of land. It is evident that the *Euclid* doctrine has spawned an almost universal acceptance of comprehensive municipal zoning in the United States.

The Supreme Court in *Belle Terre* squarely and unequivocally held that a local zoning ordinance prohibiting occupancy of one-family dwellings by more than two unrelated persons but allowing occupancy by any number of persons related by blood, adoption or marriage is not unconstitutional.

Moore unequivocally confirms the doctrine and constitutionality of *Belle Terre* and is completely dispositive of the issue. The Court, in arriving at and explaining its decision, pointed out carefully that there was one overriding factor to set this case apart from *Belle Terre.* That factor was not herein present and the Court in all other respects held that *Belle Terre* continues to be the law of the land.

While the court of appeals arbitrarily concludes that the County of Westchester can with complete impunity ignore a local zoning ordinance, it neither cites authority nor even sets forth a chain of reasoning. This is all the more incredible since in its own recent decision, *City of White Plains v. Ferraioli,* 34 N.Y. 2d 300, the court most carefully approved the *Belle Terre* case without reservation as it did in its even more recent decision of *Group House of Port Washington v. Board of Zoning and Appeals of North Hempstead,* ——N.Y. 2d——(1978). *Group House of Port Washington* is the sole decision referred to in the decision of the Appellate Term (Appendix C, 5a). In fact, the court of appeals affirmed the decision of the Appellate Division in *Port Washington* on a narrow ground that the "group home" could not be distinguished from a natural family.

In *Moore*, the facts were similar to the facts here at issue in that a zoning ordinance was questioned and the key word was "family". The statute in East Cleveland expressly selected certain categories of relatives who might live together and declared that others may not — in this instance making it a crime for a grandmother to live with her grandson. The Court meticulously pointed out that the case was distinguishable from *Belle Terre* which remains the law of the land and would have been conclusive there but for the one overriding factor that the ordinance in *Belle Terre* affected only unrelated individuals. Of course, the Pound Ridge Zoning Ordinance refers to a single housekeeping unit in a domestic relationship based upon birth, marriage or other domestic bond. Under the holding of either case, *i.e.*, *Belle Terre* or *Moore*, the Pound Ridge Zoning Ordinance would clearly be upheld. The Court stated in part, at pages B2354, B2356:

> ". . . But one overriding factor sets this case apart from Belle Terre. The ordinance there affected only unrelated individuals. It expressly allowed all who were related by 'blood, adoption or marriage' to live together, and in sustaining the ordinance we were careful to note that it promoted 'family needs' and 'family values'. 416 U.S. at 9. East Cleveland, in contrast, has chosen to regulate the occupancy of its housing by slicing deeply into the family itself. This is no mere incidental result of the ordinance. On its face it selects certain categories of relatives who may live together and declares that others may not. In particular, it makes a crime of a grandmother's choice to live with her grandson in circumstances like those presented here."

The court carefully points out that the Constitution protects the sanctity of the family because the institution of the family is deeply rooted in the nation's history and tradition. Although he

agreed that the Due Process Clause has substantive content, Mr. Justice White in a dissent, expressed fear that recourse to history and tradition would "broaden enormously the horizons of the clause" (dissent: page B2408 and discussed more fully, *infra*). (The St. Agatha transient group home wherein residence is generally forty-five days or less, could hardly be held as involving the institution and sanctity of family living as deeply rooted in the history and tradition of this nation.) The Supreme Court obviously felt (see p. B2360) that there should be some constitutional protection for grandparents or their relatives who occupy the same household and take a major responsibility for the rearing of the children. It is quite apparent that the Court is "stretching" a little here because of the unusual pattern of facts. By no stretch of imagination is the Supreme Court prepared to venture beyond grandparents or "other relatives" with the responsibility of rearing children.

Mr. Justice Stevens, in his concurring opinion, referred to the definition of "a single housekeeping unit" at page B2372 and referring to the *Belle Terre* case in a footnote stated that limiting use of single housekeeping units, like limitations on the number of occupants, protects the community's interest in minimizing overcrowding, avoiding the excessive use of municipal services, traffic control and other aspects of an attractive physical environment. With this concept, Mr. Justice Stevens has no difficulty, and he referred to the *Ferraioli* case in a footnote quoting from the precise language relating to "generic" character of a family unit as a *relatively permanent household and not a framework for transients or transient living* [sic]." (Emphasis supplied.)

The dissenting opinion of Mr. Justice Stewart, with whom Mr. Justice Rehnquist joined, holds that the arguments made by Mrs. Moore were also made in the *Belle Terre* case, and were found unpersuasive then and are equally unpersuasive now. The said dissenting opinion holds that the majority opinion has

extended the limited substantive contours of the Due Process Clause beyond recognition. It does not take kindly to the "extended family in American society" argument. It feels that where a challenged ordinance intrudes on no substantively protected constitutional right, the Supreme Court of the United States has no business to decide whether its application in a particular case is inequitable or even absurd. Mr. Justice Stewart stated in part as follows:

> "viewed in the light of these principles, I do not think East Cleveland's definition of 'family' offends the Constitution. The city has undisputed power to ordain single-family residential occupancy. Village of Belle Terre v. Boraas, supra; Euclid v. Ambler Realty Co., 272 U.S. 365. And that power plainly carries with it the power to say what a 'family' is. Here the city has defined 'family' to include not only father, mother, and dependent children, but several other close relatives as well. The definition is rationally designed to carry out the legitimate governmental purposes identified in the Belle Terre opinion: 'The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.' 416 U.S., at 9."

He also pointed out the very real difficulties of drawing a line which would not sooner or later be challenged; for example, how about the hard case of an orphaned niece or nephew or how about "long time friends". He carefully points out that any definition might produce hardships in some cases without materially advancing the legislative purposes. That an ordinance does not produce hardship is no reason to hold it

unconstitutional unless the Supreme Court is to use its power to interpret the United States Constitution as a sort of generalized authority to correct seeming inequity wherever it surfaces. In essence, he does not believe it is for the Supreme Court to re-write an ordinance or substitute its judgment for the discretion of a prosecutor who elects to initiate litigation.

Mr. Justice White also referred to Mr. Justice Black's constant reminder to his colleagues on the Supreme Court that the Court has no license to invalidate legislation which it thinks merely arbitrary or unreasonable (B2402). He stressed that, accepting the cases as they are and the Due Process Clause as construed by them, he thought it evident that the threshold question in any due process attack on legislation, whether the challenge is procedural or substantive, is whether there is a deprivation of life, liberty or property (B2402).

He stated, in part, at p. B2405:

> "The term 'liberty' is not, therefore, to be given a crabbed construction. I have no more difficulty than Mr. Justice Powell apparently does in concluding that petitioner in this case properly asserts a liberty interest within the meaning of the Due Process Clause. The question is not one of liberty, vel non. Rather, there being no procedural issue at stake, the issue is whether the precise interest involved — the interest in having more than one set of grandchildren live in her home — is entitled to such substantive protection under the Due Process Clause that this ordinance must be held invalid."

Finally, he observes, pp. B2408-2409:

> "Mrs. Moore's interest in having the offspring of more than one dependent son live with her

qualifies as a liberty protected by the Due Process Clause; but, because of the nature of that particular interest, the demands of the Clause are satisfied once the Court is assured that the challenged proscription is the product of a duly enacted or promulgated statute, ordinance, or regulation and that it is not wholly lacking in purpose or utility. That under this ordinance any number of unmarried children may reside with their mother and that this number might be as destructive of neighborhood values as one or more additional grandchildren is just another argument that children and grandchildren may not constitutionally be distinguished by a local zoning ordinance.

That argument remains unpersuasive to me. Here the head of the household may house himself or herself and spouse, their parents, and any number of their unmarried children. A fourth generation may be represented by only one set of grandchildren and then only if born to a dependent child. The ordinance challenged by petitioner prevents her from living with both sets of grandchildren only in East Cleveland, an area with a radius of three miles and a population of 40,000. Brief for Appellee 16 n.1. The ordinance thus denies petitioner the opportunity to live with all her grandchildren in this particular suburb; she is free to do so in other parts of the Cleveland metropolitan area. If there is power to maintain the character of a single-family neighborhood, as there surely is, some limit must be placed on the reach of the 'family'. Had it been our task to legislate, we might have approached the problem in a different manner than did the drafters of this

> ordinance; but I have no trouble in concluding that the normal goals of zoning regulation are present here and that the ordinance serves these goals by limiting, in identifiable circumstances, the number of people who can occupy a single household. The ordinance does not violate the Due Process Clause."

The Supreme Court, therefore, in *Moore* has, with the utmost and painstaking clarity, affirmed the doctrine of *Belle Terre* with varying degrees of emphasis. All of the opinions, concurring and dissenting, stand squarely for the doctrine espoused by petitioner herein and the constitutional unassailability of its ordinance. The case also leaves little doubt but that for the extraordinary set of facts involved, even the City of East Cleveland statute might not, per se, be invalid. As repeatedly stressed, the Pound Ridge Ordinance herein at issue is reasonable, logical and designed for specific and laudatory purposes which have the unquestioned blessings of the United States Supreme Court. The ordinance falls well within the substantial limited contours of due process and does no violation to the constitutional doctrine.

Finally, if indeed the court of appeals has concluded that an otherwise valid and long-standing municipal ordinance, ordained and enforced under its constitutional police power, may be preempted by another governmental division in direct and total defiance of the law of the land as espoused by the Supreme Court in *Euclid, Belle Terre* and *Moore,* it has grievously erred.

CONCLUSION

WHEREFORE, for all of the reasons and particularly since the Court of Appeals of the State of New York has decided this case in a way not in accord with the decisions of *Euclid, Belle Terre* and *Moore*, it is respectfully requested that this petition for a writ of certiorari be granted.

Respectfully submitted,

JAMES A. CUDDIHY
Attorney for Petitioner

APPENDIX

APPENDIX A — JUDGMENT AND REMITTITUR OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATE OF NEW YORK COURT OF APPEALS

No.

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

v.

ST. AGATHA HOME FOR CHILDREN, INC. and ROBERT KEATING,

Respondents.

On Petition to Review a Decision of the State of New York Court of Appeals

Present: The Honorable Lawrence H. Cook, Chief Justice Presiding and Jasen, Gabrielli, Jones, Wachtler & Fuchsberg, Judges

Remittitur

The appellant(s) in the above entitled appeal appeared by James A. Cuddihy: *the respondent(s) appeared by* Bodell & Magovern, P.C.

The Court, after due deliberation, orders and adjudges that the order is affirmed. Opinion Per Curiam. Concur: Cooke, Ch.J., Jaser, Gabrielli, Jones, Wachtler and Fuchsberg, JJ.

Appendix A

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Town Court, Town of Pound Ridge, *there to be proceeded upon according to law.*

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

s/ Joseph W. Bellacosa
Joseph W. Bellacosa,
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, March, 1979.

A true copy. Certified this 29th day of May, 1979.

s/ Donald M. Sherman
Deputy Clerk of the Court

APPENDIX B — OPINION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATE OF NEW YORK COURT OF APPEALS

No.

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

v.

ST. AGATHA HOME FOR CHILDREN, INC. and ROBERT KEATING,

Respondents.

On Petition for Review of the Decision of the State of New York Court of Appeals

(178) Carl A. Vergari, DA, Westchester County (James A. Cuddihy of counsel) for appellant.

David H. Berman & Gerald E. Bedell, NY City, for respondent.

PER CURIAM:

The order appealed from should be affirmed. Having elected to litigate this novel question of zoning law in the context of a criminal proceeding, the People must of course meet all burdens placed upon the People in a criminal proceeding, including the burden of proving all elements of the offense beyond a reasonable doubt. This they have failed to do.

Appendix B

Defendants are a private child care organization and one of its employees. They are charged with operating a non-secure detention center for persons in need of supervision in violation of a local zoning ordinance in an area restricted to one family occupancy. While defendants have made several arguments as to why their convictions were properly set aside by the Appellate Term, we find one so persuasive that we need not, and accordingly do not, reach their other contentions. Subdivision B of section 218-a of the County Law provides as follows: "Notwithstanding any other provision of law, each board of supervisors shall provide or assure the availability of conveniently accessible and adequate non-secure detention facilities, certified by the state division for youth, as resources for the family court in the county pursuant to article seven of the family court act to be operated in compliance with the regulations of the division for youth for the temporary care and maintenance of alleged juvenile delinquents and persons in need of supervision held for or at the direction of a family court". We interpret this subdivision as both authorizing and requiring a county to provide adequate facilities of the type described despite any conflicting law or local ordinance. In the instant case, there exists uncontroverted and indeed unchallenged evidence that defendant's operation was established at the behest of the county, that its location has been approved by the county, and that it is funded by and through the county. The county having determined, as it is authorized to do by the statute, to fulfill its obligation through the vehicle of privately operated homes, that decision may not be overruled by application of a local zoning ordinance.

Order affirmed. Opinion Per Curiam. Concur: Cooke, Ch.J., Jasen, Gabrielli, Jones, Wachtler and Fuchsberg, JJ.

Decided May 1, 1979

APPENDIX C — DECISION OF THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT, NINTH AND TENTH JUDICIAL DISTRICTS

APPELLATE TERM OF THE SECOND DEPARTMENT
NINTH AND TENTH DISTRICTS

CAL. NO. 137

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff-Respondent v. SAINT AGATHA HOME FOR CHILDREN and ROBERT KEATING Defendants-Appellants. (W)

Judgment of conviction unanimously reversed on the law and information dismissed.

The non-secured detention facility involved here was established in conformity with State policy and could not be prohibited by a contrary local zoning ordinance (see County Law §218-a; Executive Law §501, 510-a; see also *Group House of Port Washington, Inc. v. Board of Zoning and Appeals of the Town of North Hempstead,* 55 A D 2d 636).

APPENDIX D — ORDER OF THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT, NINTH AND TENTH JUDICIAL DISTRICTS

At a term of the Appellate Term of the Supreme Court of the State of New York for the 9th and 10th Judicial Districts, held in Nassau County, on the 9th day of May, 1978.

Present—
Hon. Thomas P. Farley, Presiding Justice
Hon. David L. Glickman
Hon. Mario Pittoni, Justices

The People of the State of New York,

Respondent,

vs.

Saint Agatha Home for Children and Robert Keating

Appellants

The above named Saint Agatha Home for Children and Robert Keating the defendants herein, appealed to this Court from a judgment of the Justice Court, Town of Pound Ridge, County of Westchester rendered on the 26th day of September 1977, after a trial convicting defendants of violations of Article II, Sections 200 & 220 — Article IV-A, Sections 410, 411, 411.101 — Article V, Sections 541 & 542 — Article III, Section 300 of the Zoning Ordinance of the Town of Pound Ridge and the Zoning Map of Pound Ridge and imposing sentence as follows: Conditional Discharge, special conditions, and the said appeal having been argued by David H. Berman, Esq., of counsel for the appellant, and argued by James A. Cuddihy, Esq., of counsel for the respondent, and due deliberation having been had thereon:

Appendix D

It is hereby ordered and adjudged that the judgment of conviction so appealed from be, and the same is hereby, unanimously reversed on the law and information dismissed.

s/ Thomas P. Farley
Presiding Justice,
Appellate Term

[Witnessed whereof by Charles J. Heaney, Clerk on May 9, 1979]

APPENDIX E — JUDGMENT AND ORDER OF HON. ISAAC RUBIN, SUPREME COURT OF THE STATE OF NEW YORK, WESTCHESTER COUNTY

SUPREME COURT : WESTCHESTER COUNTY

[SAME TITLE]

Index No.
02203/77

Liber
Page

RUBIN, J.

The defendants herein have been charged, by information, with a violation of the Zoning Ordinance of the Town of Pound Ridge. They now move this Court for an order, pursuant to Sect. 170.25 of the C.P.L., directing prosecution of the charge by indictment of the Grand Jury.

The defendants are the owner, the lessee, and two employees of the lessee, of what is designated as a single family house in Pound Ridge. It is the intention of the lessee, Saint Agatha Home for Children, Inc., to operate the house as a group home for up to ten (10) teen-aged children in a family type setting. The town attorney obtained the information alleging violation of the local zoning ordinance which defines a family as "one or more persons occupying a dwelling unit and living as a single housekeeping unit in a domestic relationship based upon birth, marriage or other domestic bond."

The motion must be denied. In reviewing the five traditional standards for removing a case from a local criminal court, the defendants themselves, with commendable candor, admit that

the first two — intricate and compiicated questions of fact and difficult questions of law — have no application in this case.

As to the third criterion — that a property right is involved — this Court is of the opinion that no property rights as envisioned in the criterion are involved here. The fact that the town officials are accusing defendants of an unlawful use of property does not automatically mean that a property right is involved to the extent of authorizing a trial by indictment. To hold otherwise would mean that most alleged violations of local zoning regulations would immediately be entitled to trial by indictment.

With regard to the fourth standard — that a decision may be far-reaching in its effect, and become a precedent — the Court cannot agree with the defendants' contention that this is so in this case. There has been a spate of Appellate Court decisions dealing with this problem in recent years, and it is anything but novel. See *Boraas v. Village of Belle Terre,* 416 U.S. 1; *City of White Plains v. Ferraioli,* 34 N.Y. 2d 30; *Abbott House v. Village of Tarrytown,* 34 A D 2d 821.

As to the fifth standard — that the defendants cannot get a fair trial — the Court can only characterize the defendants' arguments on this point as pure innuendo. Thus, we are told that the majority of the prospective jurors live within 2½ miles of the house and the Town Justice lives within 2 miles of the house. Defendants feel that merely by such proximity, the Justice and the jurors "may" have some personal interest in the determination to be made in the case. The law is well settled that the defendants have the obligation to submit supporting *facts* rather than conclusory statements or innuendo, to be entitled to the relief sought on this ground. (*People v. Stein,* 236 N.Y.S. 2d 703; *People v. Velasquez,* 22 Misc. 2d 90; *People v. Collins,* 18 Misc. 2d 611.)

Appendix E

The application of the defendants for an order, pursuant to Section 170.25 of the Criminal Procedure Law, directing prosecution of the charge herein by indictment of the Grand Jury, is denied, in all respects.

The foregoing constitutes the judgment and order of the Court on the motion.

Dated: White Plains, New York
April 21, 1977

s/ Isaac Rubin
ISAAC RUBIN
J.S.C.

HON. CARL A. VERGARI
District Attorney of
Westchester County
County Court House
White Plains, New York 10601

JAMES CUDDIHY, ESQ.
Attorney for the Town of Pound Ridge
595 Madison Avenue
New York, New York 10022

EDWARD W. DONNELLY, ESQ.
Attorney for Defendants
86 Maple Avenue
New City, New York 10956

APPENDIX F — ORDER OF HON. TIMOTHY J. SULLIVAN, SUPREME COURT OF THE STATE OF NEW YORK, WESTCHESTER COUNTY

SUPREME COURT — STATE OF NEW YORK
TRIAL/SPECIAL TERM, PART WESTCHESTER COUNTY

Present:

HON. TIMOTHY J. SULLIVAN
Justice.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index Number
02203/77
333/297

PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs,

-against-

SAINT AGATHA HOME FOR CHILDREN & ROBERT KEATING,

Defendants.

The following papers numbered 1 to 2 read on this motion for an order pursuant to CPL 460.50 staying execution of a judgment of conviction and conditional discharge of the Town Court of the Town of Pound Ridge.

Appendix F

PAPERS NUMBERED

Order to Show Cause — Affidavits	1
Answering Affidavits	2

Upon the foregoing papers it is ordered that this motion is granted and the judgment being appealed is hereby ordered stayed pending determination of the appeal by the Appellate Term. Since the conviction being appealed is for a violation of a zoning ordinance and there is no allegation of any wrong-doing to the Community by the children residing at the defendant home, it would be an abuse of the Court's discretion not to grant the requested stay pending appeal. Defendants are directed however to proceed with the appeal forthwith so that the issues in this matter maybe fully resolved as quickly as possible.

Dated 10/13/77 Entered Oct. 14, 1977

s/ Timothy J. Sullivan
J.S.C.

APPENDIX G — INTERMEDIATE DECISION OF JUDGE EICHELBURG, TOWN COURT OF THE TOWN OF POUND RIDGE, NEW YORK

TOWN COURT OF THE TOWN OF POUND RIDGE

THE TOWN OF POUND RIDGE

-against-

ST. AGATHA HOME FOR CHILDREN, INC. ROBERT KEATING, FITZGERALD PETERKIN and RAYMOND VOLPER,

Defendant.

Upon the Motion of St. Agatha Home for Children, Inc., Robert Keating and Fitzgerald Peterkin dated May 26, 1977 and the Motion of Raymond Volper *et al* dated May 27, 1977,

And upon consideration of the Cross-Motions submitted by James A. Cuddihy, Esq. on behalf of the People of the State of New York dated June 6, 1977 and June 8, 1977 in opposition thereto.

The aforesaid Motions of May 26th and May 27th are granted to the extent they are not opposed.

s/ Robert J. Eichelburg
Robert J. Eichelburg
Town Justice
Town of Pound Ridge
June 13, 1977

APPENDIX H — DECISION OF THE TOWN COURT OF THE TOWN OF POUND RIDGE

TOWN COURT OF THE TOWN OF POUND RIDGE
POUND RIDGE, NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

-against-

ST. AGATHA HOME FOR CHILDREN, INC., ROBERT KEATING FITZGERALD PETERKIN and RAYMOND VOLPER,

Defendants.

St. Agatha Home for Children (St. Agatha), a private agency, and Robert Keating (Keating) presently stand charged for use of a one family dwelling in Pound Ridge contrary to a local zoning ordinance prohibiting such occupancy by more than one family, i.e. one or more persons in a domestic relationship based on birth, marriage or other domestic bond. Similar charges were dismissed at trial against the remaining defendants when it was established that they were not given notice of the zoning violation as required by the Pound Ridge ordinance. St. Agatha and Keating maintained as their principal defense that they were entitled to operate the home under applicable laws of the State of New York which superceded any local zoning ordinances. This defense, without doubt, is absolute and one on which the court would acquit if apposite; however, in the present circumstances it is inapplicable. At trial it was established that St. Agatha and Keating were using the home as a "non-secure detention facility" for the care of alleged persons in need of supervision (PINS) and alleged juvenile delinquents. There is

neither statutory authority or case law that allows this use of a one family dwelling by a private agency and accordingly St. Agatha and Keating are in violation of the zoning ordinances as charged.

St. Agatha is a New York corporation which recently became merged with the New York Foundling Hospital, one of the functions of the St. Agatha group being to provide proper care for children with problems or children without parents. Keating is the Director of Community Services for St. Agatha. One of Keating's functions was to search for, examine and acquire leasehold interests in one family dwellings for the purpose of establishing residences that were to be administered by St. Agatha in accord with the laws of the State. After approval of the leased premises was obtained by the New York State Division for Youth St. Agatha would operate the home for a fee which varied according to the number of children that were committed to the home.

One of the defendants against whom the charges were dismissed, Raymond Volper (Volper), owns a single family dwelling on Fancher Road in Pound Ridge and entered into a two year lease on January 10, 1977 with St. Agatha. It was through Keating's efforts that the lease of the Volper home was consummated.

The Volper home subsequent to the signing of the lease was used and, as of the date of the trial, continues as a non-secure detention facility for boarding children for a period of no more than about two to about three months. The children do not attend local schools nor do they participate in community activities of any kind in Pound Ridge. They are given courses in vocational and academic training from two resident teachers at the home and additionally three child welfare workers are there during the daytime while two staff workers remain on duty overnight with one of them awake at all times. There is no family or blood relationship between the teachers, supervisors or

the children and in addition to the various duties performed by the workers, custodial duties and the preparation of meals were also their responsibility.

Critical to the determination of the legal issues in the present case is the fact that the home is used as a non-secure detention facility and the children referred there by the Family Court of Westchester County are alleged PINS and alleged juvenile delinquents who are accused of offenses including auto thefts, shop-lifting and burglaries. As of the time of the trial, approximately thirty children had already passed through the home.

Prior to the issue of a summons by the Town Attorney charging St. Agatha and the other defendants with a violation of the Town zoning ordinances, an information meeting was held by St. Agatha in the Town of Pound Ridge on January 12th explaining their purpose and function. After January 12th and prior to the issuance of a summons by the Town Attorney, the building inspector, Murray Crandell (Crandell), notified St. Agatha of the violation of the Town ordinance that prohibited the occupancy of a single family dwelling by more than one family. Although no written notice was given to them to cease and desist the violation, on several occasions Crandell advised St. Agatha through Keating that the home was in violation of the Town ordinances and that they should cease and desist.

The summons subsequently issued by the Town of Pound Ridge charged St. Agatha, Keating and the other defendants of violating the zoning ordinances of the Town of Pound Ridge, Article II, Sections 200 and 220; Article IV-A, Sections 410, 411, 411.101; Article V. Sections 541 and 542; Article III, Section 300 and the zoning map of Pound Ridge by using a home zoned as a one family dwelling unit for occupancy by more than one family, where a single family is defined under the zoning law as "one or more persons in a domestic relationship based on birth, marriage or other domestic bond."

The violations of the zoning ordinances are quasi-criminal offenses, essentially civil matters as are most vehicle and traffic violations although criminal procedures and forms are applied. *People v. Bonnerwith*, 69 Misc. 2d 516, 330 N.Y.S. 2d 248 (1972); *Mann v. Town of Southold*, 44 Misc. 2d 978, 255 N.Y.S. 2d 308 (Sup. Ct. 1964); *People v. Dombroski*, 63 Misc. 2d 85, 310 N.Y.S. 2d 447 (County Ct. 1970).

The defendants have raised the argument that improper notice was given to them since they had only received oral notice. It is their position that written notice should have been given since this was the manner in which the Town of Pound Ridge traditionally prosecuted zoning violations. It is believed that under the circumstances of the present case in which one of the principal officers of St. Agatha, Mr. Keating, stated that under no circumstances would he or St. Agatha cease or desist from operating the home as they had set out to do, written notice of a violation with a time limit for removal of the violation would be pointless. There was ample opportunity and notice to cure the violation prior to the summons, and after the issuance of the summons and prior to the trial. St. Agatha and Keating on several occasions said they would not cease.

A defense offered by St. Agatha and Keating turns on two decisions of the courts of the State of New York relative to the operation of a "group home." These include a leading case decided by Chief Judge Breital in *City of White Plains v. Ferraioli*, 34 N.Y. 2d 300, 357 N.Y.S. 2d 449, 313 N.E. 2d 756 (1974) and *Group House of Port Washington, Inc. v. Board of Zoning and Appeals of the Town of North Hempstead*, 55 A.D. 636, 390 N.Y.S. 2d 427, 82 Misc. 2d 634 (1977). In fact, the opinion of Judge Breitel in the Ferraioli case was offered by Keating as the reason why he and St. Agatha were entitled to operate a residence for minors in Pound Ridge, this having been made known by Keating to Crandell, the building inspector, prior to the issuance of the summons. Both the Ferraioli and Port Washington cases will be discussed at length further. It is

sufficient to note at this point that these and other decisions relating to the issues in this case turn on an interpretation of local zoning ordinances and other laws of the State of New York, the latter logically requiring examination before any discussion of the judicial interpretations of them.

It has been argued with some force that the County Law Section 218-B, Executive Law 510-a-2 and indirectly the Social Services Law Section 374-e comprise superannuating statutes that have restricted the jurisdiction of the Town of Pound Ridge in zoning matters concerning "non-secure detention facilities", "agency boarding homes" or "group homes." There can be no doubt that this position goes beyond an argument of policy which was advanced during trial and that there is a statement of the legislature that expresses their purpose that local zoning statutes must give way to a broader program that has as its goals the harboring and care of children. On its face, it would appear that this disposes of the issue; however, it is the burden of the court to determine more precisely not only what agency is empowered to operate these facilities, but also the type of care that was intended, the class of children to whom it applied and the type of facilities that were to be provided.

In attempting to determine the legislative purpose of the various statutes, the difficulty is that it is often undiscoverable. This is not to say that legislative purpose can never be determined or that the courts are left to some process of *Gefuhlsjurisprudenz* or *Freigesetzfindung* to grasp it. [Cf. Landis, *A Note on "Statutory Interpretation"* 43 Harv. L. Rev. 886 (1930)]. Fortunately there are records of legislative assemblies such as committee reports, *Tagg Brothers and Moorehead v. United States,* 280 U.S. 420 50 S. Ct. 220 74 L. Ed. 524 (1930), *Penn. Mutual Life Insurance Co. v. Lederer,* 252 U.S. 523, 534, 40 S. Ct. 397 64 L. Ed. 698 (1920) and changes made in light of earlier statutes and their enforcement, *Brandise, J.* dissenting in *Dahnke-Walker Co. v. Bondurant,* 257 U.S. 282, 299 45 S. Ct. 106 66 L. Ed. 239 (1921) all of which give evidence

of a real and not a ficticious purpose and with traditional canons of construction should be deemed to govern questions of interpretation. As Professor Landis has noted:

> It must be insisted that the legislative purposes and aims are the important guideposts for statutory interpretation, not the desiderata of the judge. And there is a world of difference between an attitude of mind that honestly seeks to grasp these and give them effect, and one that cavalierly throws them overboard . . . The so-called rules of interpretation are not rules that automatically reach results, but ways of attuning the mind to a vision comparable to that possessed by the legislator. The vision of itself rarely actually grasps the particular determinate, but the eye once aligned in the same direction will more probably place a particular determinate in its appropriate spot. The despised rules of *expressio unius exclusio alterius,* presumptions of strict and liberal interpretation, are of this character. They predicate attitudes of mind more likely to recreate the atmosphere surrounding the statute in its passage and thus more likely to give effect accurately to the real legislative purpose. Like more "rules of law," they solve only the obvious case, and give a direction for profitable thinking about the difficult ones. And it is true of them as of most "rules of law," that occasions will arise when they must be broken.
>
> The use of extrinsic aids to statutory interpretation thus has real and not illusory significance. Hopeful developments toward a science of statutory interpretation must be in the direction of devising means of properly evaluating the effectiveness to be given such

> extrinsic aids. Of course, guessing will not thereby be eliminated; but what science, natural or otherwise, has eliminated the necessity for guesswork? Nevertheless the emphasis must lie upon the honest effort of courts to give effect to the legislature's aims, even though their perception be perforce through a glass darkly. (43 Harv. L. Rev. 886 Supra at pp. 892, 893)

It is appropriate to note the following from a 1976 memorandum that pertains to various legislation enacted by the State of New York between 1971 and 1976 that bears on juvenile detention:

> *Confusion abounds* (court's emphasis) since detention specialists and detention local assistance activities were transferred to the division (for youth) from the Department of Social Services in 1971 without transfer of their authority as was accomplished at the same time for training school staff and programs. (New York State Legislative Annual — 1976 Ch. 880 p. 226).

In considering this legislation, it should be noted that various provisions of the Social Services Law, Sections 371 and 398, County Law, Section 218, Family Court Act and the Executive Law, Section 510-a are in *pari materia (Cf.* New York State Legislative Annual — 1976 Ch. 880 p. 226) and similarly the Social Services Law (formerly the Social Welfare Law) Sections 371, 398, 374-b, c, and e are similarly related and must be considered together *(Cf.* New York State Legislative Annual — 1962, Ch. 584, p. 133; New York State Annual — 1967, Ch. 479, p. 151 and New York State Legislative Annual — 1967, Ch. 276, p. 148).

There can be no doubt that the County Law, Section 218-a-B gives a county the power to abrogate any provisions of law that would interfere with their establishing non-secure detention facilities certified by the State Division for Youth. The language of the statute is clear-cut and even though Westchester County no longer acts through a Board of Supervisors but rather a County Board of Legislators, it is obvious that the power conferred on the Board of Supervisors was also intended to be bestowed on the new legislative body of the county as well. There is nothing in the statute that permits the legislative body in Westchester County to delegate this authority to the State Division for Youth or a private agency either directly or by implication. In fact, the legislative history of this provision indicates that only the county was initially empowered to operate non-secure detention facilities. In 1970 this purpose was expressed as follows:

> Several responsible organizations that have studied the problem, including the National Council on Crime and Delinquency, have recommended the development of State-operated regional secure facilities to assure adequate detention care on a statewide basis. The bill authorizes the establishment and operation of such facilities by the Department of Social Services.
>
> Many judges and probation service personnel believe that some children now being detained in secure detention facilities do not require such care.
>
> Unfortunately, in many cases, no alternative resources are available. This bill, by requiring counties to make non-secure detention facilities available, constitutes a major step towards insuring that children will not be placed unnecessarily in locked facilities.

Appendix H

(New York State Legislative Annual — 1970, Ch. 881, p. 516)

In 1973, Section 510-a of the Executive Law empowered the State Division for Youth to establish, operate, maintain and certify non-secure detention facilities (L. 1973 c. 1037 effective September 1, 1973). The power to contract for non-secure detention facilities was given to them by an amendment to the Executive Law in 1976 (L. 1976 c. 880, Section 13 effective 120 days after July 26, 1976). It is important to note, however, that the 1976 amendment of the Executive Law, Section 510-a was passed simultaneously with the 1976 amendment to the County Law, Section 218-a-B to include county operated non-secure detention facilities to be certified by the State Division for Youth. (L. 1976 c. 880, Section 3). The only intergration of the State Division for Youth's function with those of the county as revealed by the time at which the 1976 legislation was enacted related to certification by the Division for Youth of county facilities and was silent as to powers, privileges or immunities flowing from one to the other. This analysis is critical to a determination as to whether the power of the county to override existing legislation was passed on to the Division for Youth or the private sector by the 1976 act. It can only be concluded that this was not done nor was it intended and consequently the only agency that would have the power to override laws that interfered with the county's power to establish non-secure detention facilities was the county "Board of Supervisors" or their successor, i.e. the County Board of Legislators. This is further borne out by the legislative memorandum reflecting legislative purpose as to the 1976 changes in the law. The Division for Youth as indicated in this memorandum was empowered to certify county facilities and monitor, control and sanction the use of detention facilities. No other power was given to the Division nor was it intended. The memorandum in part notes that:

Appendix H

This bill:

> provides for "adequate care" as defined in the executive law and for Division certification of county facilities; . . .
>
> authorizes the Division to visit, inspect, monitor, formulate rules and regulations and enforce such rules and regulations in relation to its reimbursement responsibilities for care in facilities and homes.
>
> Implementation of legislative intent to detain only those children who require removal from home during judicial processing, and then *for the shortest period possible,* (court's emphasis) has been stymied by lack of clarity as to the Division's authority to monitor, control and sanction use of detention facilities. This proposed legislation will establish standard setting, inspection and reporting responsibilities clearly in the Division, with implied coordinating and leadership functions. Localities have requested much of what is proposed . . .
>
> (New York Legislative Annual — 1976 Ch. 880 p. 226)

The County of Westchester did not enter into the lease for the Volper home in Pound Ridge nor did they do so indirectly through any county agency. St. Agatha, a private charitable organization, was the sole signatory to the contract as lessee. St. Agatha was also the operator of the facilities and as such the County Law, Section 218-a-B does not apply to override other provisions of law that would prohibit the operation of the shelter in Pound Ridge such as the Pound Ridge zoning ordinance. The State Division of Youth, although having the

power to contract for the operation of non-secure detention facilities by Executive Law 510-a-2 could employ St. Agatha in such capacity but lacking the statutory power to override local zoning ordinances would have to, in the language of the statute, find "suitable locations" which would exclude residential districts zoned for single family occupancy. Only multiple occupancy zoning would be suitable in this regard because of the lack of family identity of the occupants of a non-secure detention facility as will be discussed subsequently. Stated otherwise, the operation of the premises in Pound Ridge by an agency that is in the private sector does not remove it from the restrictions of local zoning ordinances. If exemptions from local laws are to be obtained, it must be done through the agency that has the statutory power to override such laws which in this instance would be the County of Westchester under County Law, Section 218-a-B.

That this was the purpose of the legislature in passing County Law Section 218-a-B is also suggested when this section of the County Law is compared to Social Services Law, Section 374-e which very clearly empowers a public welfare official, in spite of any other provisions of law, to contract with individuals for their services for conducting agency boarding homes or group homes and caring for children or minors placed in such homes. These provisions were not similarly enacted with respect to non-secure detention facilities.

The Pound Ridge zoning ordinances would also be violated by the operation of a non-secure detention facility by the State Division of Youth were the Division to enter into a lease for premises in Pound Ridge. Again, the only governmental body that has the legislatively granted power to be exempt from local zoning ordinances in matters such as the establishment of non-secure detention facilities remains with the County of Westchester under the County Law, Section 218-a-B. This is especially so in view of the cannon of legislative construction, *expressio unius exclusio alterius.*

At the time of the passage of the predecessor to Section 374-c of the Social Services Law, Sections 371, 398, 402 and 374-e which was new at the time were also passed. Section 371 included a definition of a group home, Section 398 also gave authority to a public welfare official to place a child in a group home and Section 374-e which removed local zoning prohibitions was newly added.(L. 1971 c. 276 Sections 1 and 2 effective September 1, 1967)

Social Services Law, Section 398, defines powers and duties of public welfare officials and with respect to "delinquent children" provides in Section 398-3 that a public welfare official can *"receive"* a delinquent child or PINS placed in their care by the Family Court. It is important to observe that this latter section does not refer to alleged "juvenile delinquents" or PINS but children who have been adjudicated so. (*Cf.* Social Services Law Section 371-5 and 6) Section 398-4 and 5 are the only empowering portions that indicate the type of children that may be *placed* in "agency boarding homes" or "group homes" as defective and physically handicapped children or children born out of wedlock. Section 398-6(g) further notes that as to all the classes of children previously denoted in Section 398 a public welfare official can place them "in suitable instances" in family homes, agency boarding homes, group homes or institutions.

As to whether or not Section 398-3 and 398-6 (g) as amended to include group homes also took into account provision for the care of adjudicated juvenile delinquents or PINS, it should be clear from a memorandum of the City of New York that this was not intended. The memorandum states that "the object of this bill is to authorize public welfare districts to establish and maintain institutions for the long-term care of children who cannot be cared for in their own homes." (New York State Legislative Annual-1967 p. 151 c. 479) It is believed that this language clearly indicates that the purpose of the group home was the provision of child care facilities where the child's own home was inappropriate or inadequate to this task. The

concept of a group home therefore could not be interpreted from this legislative purpose to include caring for adjudicated delinquents or PINS since under no circumstances would children of this status be cared for in their own homes. It is obvious that the group home is a surrogate home.

Social Services Law Section 398-4 (a) and 5 (a) are the only enactments that provide for agency boarding home and group home care for specific classes of children, i.e. defective and physically handicapped children as well as children born out of wedlock. (L. 1967 c. 276 Section 4 and 5 effective September 1, 1967)

To complete the review of Section 374-c, it should also be noted that in 1971 authority to operate group homes was given to authorized agencies (i.e. private agencies) by the state legislature in addition to state officials. (L. 1971 c. 677 Section 1 effective June 22, 1971)

A review of the precursor legislation in the area of private agency homes is necessary to the understanding of Social Services Law Sections 374-c and 374-3. In 1962 when the Social Services Law was designated the Social Welfare Law, Section 374-b was newly enacted (L. 1962, c. 584 Section 3 effective September 1, 1962) to provide for agency boarding homes. The purpose of the bill was to make specfic provision for the operation and use of family-type boarding homes for children by private authorized child caring agencies and also for their operation by public welfare officials. With the introduction of Section 374-b, amendments of Section 371 (Definitions), Section 373 pertaining to religious faith and most importantly Section 398 which pertain to powers and duties bestowed on public welfare officials also were made to take into account the new concept of agency boarding homes. (New York State Legislative Annual-1962, Ch. 584 p. 133). Legislative purpose was further described as follows:

> Experience has indicated the need for such agency operated boarding homes for children. There have not been enough family operated boarding homes to accommodate all the children who should be cared for in a family setting, and it is increasingly difficult to find accommodations in them for certain individual children, children of certain ethnic groups and for large groups of brothers and sisters. There is assurance that the children in agency operated boarding homes can remain so long as it is in their interest, and not be subject to removal at the whim of an individual operator . . . Because the existing law makes specific provision only for family operated boarding homes, private agency boarding homes have had a doubtful legal status which would be set to rest by enactment of this bill, and the bill also would provide for the operation of such homes by public welfare officials in appropriate instances where the need is demonstrated.
>
> (New York Legislative Annual-1962 *Supra* at p. 133)

The foregoing language indicates that temporary or short term care was not intended for children in agency operated boarding homes by emphasizing the "family setting" aspect of such care. Accordingly Section 398 6 (g) (L. 1962 c. 584) which was also modified to include agency boarding homes at that time clearly did not apply to adjudicated juvenile delinquents or PINS being cared for in such homes. This should be clear from the foregoing legislative purpose which was concerned about the removal of children from privately operated boarding homes at the whim of an individual operator and the fact that large groups of brothers and sisters were to be cared for in a family setting. Perforce an adjudicated juvenile delinquent or PINS could not be removed from a facility by the whim of an operator

and obviously the agency boarding home was not created for the purpose of caring for children that fell into such classifications.

Group homes were legislatively sanctioned for the first time in 1967, five years after agency boarding homes were created by the enactment of the predecessor to the Social Services Law Section 374-c (L. 1967, c. 276 Section 3 effective September 1, 1967). It was determined that group homes with not less than seven nor more than twelve children would be desirable for providing care in a residential setting closely identified with community living similar to foster homes. Many private, non-profit agencies were presently operating such facilities and it was felt that public welfare officials should also have the same authority. (New York State Legislative Annual-1967 c. 479 p. 148) With respect to the 1967 legislation, a memorandum was submitted by the City of New York which further amplified long-term care as the purpose of the statute as follows:

> The object of this bill is to authorize public welfare districts to establish and maintain institutions for the long-term care of children who cannot be cared for in their own homs . . .
>
> These children must await long-term placement for indefinite periods of time in our temporary shelters, or remain in inappropriate homes in the community, or in mental hospitals after their need for such specialized care has ceased.
>
> Our temporary shelters, which lack appropriate programs and resources for good long-term group care, have become, in effect, institutions for long-term care. More than fifty of the children in shelters maintained by the Department of Welfare have been in the shelter for more than ninety days. A substantial number remain in shelter care from one to three years,

> and some even longer. This bill would enable the New York City Department of Welfare to fill a need for long-term placement facilities for children which is not being adequately met by our volunteer child-caring agencies.

(Memorandum of the City of New York, New York State Legislative Annual-1967 c. 479 p. 151)

All of the foregoing indicates a clear pattern to allow for the care of children in private homes by private agencies under the auspices of the Social Services Department. The homes to be established were surrogate homes for children in need as distinguished from children that had to be institutionalized for socially unacceptable behavior. Paramount to such care was the provision of long-term as opposed to short-term stays in residential areas. It should be obvious that the purpose was to provide children in such homes with a feeling of permanence and security. There can be no doubt of this in view of the legislative history.

Turning now to Section 371, a clear distinction has been made between group homes and agency boarding homes on the one hand and non-secure detention facilities on the other by which the former has been created by statute to provide long-term care whereas the latter comprises short-term care. Obviously an agency boarding home or a group home could not be employed as a non-secure detention facility for this reason *inter alia*. Additionally, the class of children for whom agency boarding homes and group homes were created were those children who required a surrogate home and not alleged or adjudicated juvenile delinquents or PINS.

Social Services Law Section 398 Sub divisions 4 (a) and 5 (a) relate to defective and physically handicapped children as well as children born out of wedlock as those whom commissioners of public welfare and some public welfare officers

of cities have the authority to place in agency boarding homes and group homes. The court need not reach any decision as to whether or not this is an exclusive class of children that are to be cared for in agency boarding homes or group homes since this issue has not been presented. It is sufficient to note that the children presently occupying the St. Agatha home in Pound Ridge, at least as far as the trial testimony goes, have not been shown to fall into either one of these classes.

As noted previously, the defendants have placed reliance on the decision of Judge Breitel in the Ferraioli case as supporting the operation of the home in Pound Ridge as a non-secure detention facility. This reliance is misplaced since the Ferraioli case is distinguishable as pointed out by the Town Attorney in his brief. Whereas the Ferraioli case involved a group home having a married couple and their two children plus ten foster children in which seven of the ten were related and the other three were unrelated the Pound Ridge facility was not staffed by a married couple with children but by unrelated employees administering to unrelated children. In Ferraioli, the children were natural and foster living together as if they were brothers and sisters and the married couple as their common parents whereas this relationship was not present in the Pound Ridge home. Most important, however, is the fact that the Pound Ridge home is a temporary living arrangement for children whereas in Ferraioli a long-term living arrangement was present in which neither the foster parents nor the children were to be shifted about akin to a traditional family which would be sundered by death, divorce or emancipation of the young.

The Ferraioli case is important as much for what it does not decide as well for what it does decide. It was contended in Ferraioli that the local zoning ordinance that prohibited a group home contravened the State School Services Law; however, the court never reached that issue. Judge Breitel noted that "since it is concluded, however, that a group ho e is a family, this broader question need not now be resolved by this court." *(City*

of White Plains v. Ferraioli, supra, at p. 306) Accordingly, the Ferraioli decision only holds that where a household manifests all the outward signs of a single family and are occupying a residence in a single family zone, they cannot be held to be in contravention of local one family zoning laws. There can be no such disposition with respect to St. Agatha and Keating since clearly the transient nature of the children at the home and the lack of affinity of the members of the group in a traditional family sense prohibit such a conclusion.

It is appropriate to mention at this point that the defendants have argued that the Pound Ridge zoning ordinance is unconstitutional since there is no ascertainable standard of conduct by which they can gauge their actions in attempting to establish a "family" setting or other "domestic bond" that would able them to legitimately occupy the Volper home in Pound Ridge. The argument is pointless in view of the reliance they consistently placed upon the decision of Judge Breitel in Ferraioli in which the concept of a family was judicially expounded. Having fallen short of the mark set in the Ferraioli decision, the defendants now claim that there is no standard by which to determine what constitues a "family" or "domestic bond" for zoning purposes. It is sufficient to say that the argument is without merit.

The decision in Group House of Port Washington is also distinguishable. In that case, the proposed group home in a single family residential zoning district was to house seven young people with foster parents who would be relieved on occasion by substitute parents all pursuant to the Social Services Law Section 374-c and 371-17. The court noted that the period of residency of the youngsters was to be determined by their response to psychiatric treatment and although the precise period of time of the treatment was indeterminate it still qualified as a group home under the statute. It should be noted with particularity that the occupants of the group home in the Port Washington case did not meet the Ferraioli test of what

constituted a "family" but constituted a special class of children requiring psychiatric care which on its face is entirely consistent not only with the Social Services Law Section 374-c but also Section 398-4 (a) which authorized commissioners of public welfare to place defective and physically handicapped children in group homes. The requirement for psychiatric services at least by implication would indicate that the home was operated entirely within the statute providing for care of "defective children." Reliance by that court on Mr. Justice Shapiro's decision in the Ferraioli case (400 A.D. 2d 1001, 1002-1003) is well placed since he noted that all local zoning ordinances had to give way to the State purpose pursuant to Social Services Law 374-c, which this court has previously referred to as the so called superannuating statute. The Ferraioli and Port Washington cases do not conflict with one another; the former allows a home to be used in a single family area by unrelated members of a group where there is a demonstrated family affinity whereas in Port Washington, lacking such affinity, a group home may be operated in a single family area pursuant to the Social Services Law. The Port Washington case is inapposite here because it dealt with a group home that on its face was being used according to statute by providing psychiatric services or treatment for children as distinguished from the St. Agatha home in Pound Ridge which is being employed as a non-secure detention facility.

Abbot House et al v. Village of Tarrytown et al, 34 App. Div. 2d 821, 312 N.Y.S. Supp. 2d 841 (1970) relates to the authority of the plaintiff to operate an agency boarding home which was upheld by the court and further in which the court voided a local zoning ordinance that prohibited such a use of a single family dwelling by Abbot House. This memorandum decision appears to be based not only on the power of the court to invalidate legislation contrary to state law and state policy but was also decided three years after the 1967 enactment of Social Services Law Section 374-e that declared any local zoning ordinance that prohibited the establishment of an "agency

boarding home" or "group home" as being overridden by state law. It is not apparent from the face of the decision on what basis the local zoning ordinance was voided. The issue at hand in Abbot House was the establishment of an agency boarding home which was permitted in contradistinction to a non-secure detention facility.

Accordingly, there being no evidence that there is an overriding state policy to allow the establishment of non-secure detention facilities in single family areas of local communities by a private agency or the State Division for Youth, the question is whether local communities such as the Town of Pound Ridge are empowered to establish zoning regulations consistent with their police power to control through local legislation, matters that would affect the health, safety and welfare of the residents of the town. This authority was given through Town Law Section 261.

Local zoning ordinances have been sanctioned by the United States Supreme Court in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed 303 (1926) as a legitimate exercise of the police power. In *Village of Belle Terre v. Boraas,* 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 797 (1974) the extent of that police power included laying out districts devoted to family values and youth values, stating in part at page 9:

> A quiet place where yards are wide, people few and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker, Supra.* The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Appendix H

The exclusion of non-family occupancy of single family dwellings by the Pound Ridge zoning ordinances is therefore a proper exercise of this power.

For all of the foregoing reasons, St. Agatha and Keating are in violation of the zoning ordinances as charged.

s/ Robert J. Eichelburg
Robert J. Eichelburg
Justice of the Court of
Special Sessions,
Town of Pound Ridge, New
York

9/12/77

APPENDIX I — ARTICLE II, SECTIONS 200 AND 220 OF THE TOWN LAW OF THE TOWN OF POUND RIDGE

Article II, Zoning Ordinance of the Town of Pound Ridge

ARTICLE II. DEFINITIONS

SECTION 200. For the purposes of this Ordinance, certain words and terms used herein are defined as follows:

Section 220. Definitions

* * *

Dwelling:
A building designed or used exclusively as living quarters and shall not be deemed to include motel, hotel, rooming house or tourist home.

Dwelling, 1-Family:
A detached building containing one family or housekeeping unit.

Dwelling Unit:
A building, or portion thereof, providing complete housekeeping facilities for one family.

Family:
One or more persons occupying a dwelling unit and living as a single housekeeping unit in a domestic relationship based upon birth, marriage or other domestic bond.

* * *

APPENDIX J — ARTICLE III, SECTION 300 OF THE TOWN LAW OF THE TOWN OF POUND RIDGE

Zoning Ordinance of the Town of Pound Ridge

ARTICLE III. ESTABLISHMENT OF DISTRICTS

SECTION 300. District Classification

The Town of Pound Ridge is hereby divided into the following classes of districts:

R-3A Three Acre Residence District
R-2A Two Acre Residence District
R-1A One Acre Residence District
LNG Landscape Nursery and Garden Center District
PB-A Planned Business District A
PB-B Planned Business District B
PB-C Planned Business District C

APPENDIX K — ARTICLE IV-A, SECTIONS 410, 411, 411.101 OF THE TOWN LAW OF THE TOWN OF POUND RIDGE

Zoning Ordinance of the Town of Pound Ridge

ARTICLE IV-A REGULATIONS FOR RESIDENCE DISTRICTS

SECTION 410. Regulations for Residence Districts

The following regulations apply to the Residence Districts established under this Ordinance.

411. Schedule of Permitted Uses

In any Residence District, no building or premises shall be used, and no building or group of buildings, or part of a building or structure, shall be erected, constructed, enlarged, altered, arranged or designed to be used, in whole or in part, except for one or more of the uses set forth below. Only those uses specifically listed as being permitted shall be permitted.

411.1 Permitted Principal Uses

411.101 One Family Dwellings

* * *

APPENDIX L — ARTICLE V, SECTIONS 541 AND 542 OF THE TOWN LAW OF THE TOWN OF POUND RIDGE

Zoning Ordinance of the Town of Pound Ridge

Section 540. Violations and Penalties

541. Any owner, lessee, tenant, occupant, architect or builder, or the agent of any them, who violates, or is accessory to the violations of any provisions of this Ordinance, or who fails to comply with any of the requirements thereof, or who erects, constructs, alters, enlarges, converts or moves, uses any building or, uses any land, in violation of said detailed statement or plans submitted by him and approved, under the provisions of this Ordinance, shall be guilty of a misdemeanor, and shall be liable to a fine which shall not exceed $50.00 or imprisonment for a period not to exceed six months, or by both such fine and imprisonment. Each week's continued violation shall constitute a separate additional violation. Violations shall be prosecuted and penalties collected in the manner prescribed by Law or Ordinance effective in the Town.

542. Any building erected, constructed, altered, enlarged, converted, demolished, moved or removed, or used contrary to any of the provisions of this Ordinance, and any use of any land or any building which is conducted, operated, or maintained contrary to any of the provisions of this Ordinance, shall be and the same is hereby declared to be unlawful. The

proper Town authorities may institute an injunction, mandamus, abatement or any other appropriate action to prevent, enjoin, abate, or

remove such erection, construction, alteration, enlargement, conversion, or use in violation of any of the provisions of this Ordinance. Upon the failure or refusal of the proper local officer, board or body of the Town to institute any such appropriate action or proceeding for a period of ten days after written request by a resident taxpayer of the Town to so proceed, any three taxpayers of the Town residing in the district wherein such violation exists, who are jointly or severally aggrieved by such violation, may institute such appropriate action or proceeding in like manner as such local officer, board or body of the Town is authorized to do. The Building Inspector shall serve notice personally or by registered mail, and, if by mail, it may be addressed to the owner or occupant of the premises where such violation exists, at the address given by him upon the application for any permit required under the provisions of this Ordinance or the Building Code of the Town, or to the last known address of the owner as shown by the records in the Office of the Town Receiver of Taxes or in the Office of the Clerk of the County of Westchester, and if such violation does not cease within such time as proper Town authorities may specify, and a new Certificate of Compliance is not obtained, they shall institute such of the foregoing action as may be necessary to terminate the violation. Such notice may also be served by posting on the premises. The remedies provided for herein are cumulative and not exclusive, and shall be in addition to any other remedies provided by law.

APPENDIX M — SECTION 261 OF THE TOWN LAW

Town Law of the State of New York

§261. Grant of power; appropriations for certain expenses incurred under this article

For the purpose of promoting the health, safety, morals, or the general welfare of the community, the town board is hereby empowered by ordinance to regulate and restrict the height, number of stories and sizes of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes; provided that such regulations shall apply to and affect only such part of a town as is outside the limits of any incorporated village or city; provided further, that all charges and expenses incurred under this article for zoning and planning shall be a charge upon the taxable property of that part of the town outside of any incorporated village or city. The town board is hereby authorized and empowered to make such appropriation as it may see fit for such charges and expenses, provided however, that such appropriation shall be the estimated charges and expenses less fees, if any, collected, and provided, that the amount so appropriated shall be assessed, levied and collected from the property outside of any incorporated village or city. Such regulations may provide that a board of appeals may determine and vary their application in harmony with their general purpose and intent, and in accordance with general or specific rules therein contained. L.1932, c. 634; amended L.1956, c. 936, § 1, eff. Jan. 1, 1957.